SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5386

UNITED STATES OF AMERICA *ex rel.* JOHN BUTLER,

Petitioner,

—against—

JAMES A. THOMAS, Warden, Rikers Island Prison,
14-14 Hazen Street, East Elmhurst, N.Y.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The opinions below, the jurisdictional requisites, the question presented, the reference to the constitutional provisions involved and the statement of the case are all adequately covered by the Petition and will, therefore, not be repeated or restated.

ARGUMENT

Baldwin v. _New York_, 399 U. S. 66 (1970), should not be applied to trials completed before it was decided.

(1)

In *People* v. *Dargan*, 27 NY 2d 100 (1970), it was held that the ruling in *Baldwin* v. *New York*, 399 U. S. 66 (1970), should not be applied retroactively. As a consequence, a conviction for a misdemeanor, punishable by a maximum

sentence of imprisonment for one year under which the appellant therein had been sentenced to seven months' imprisonment, was sustained even though the appellant had been denied his request for a jury trial.

An application for certiorari was denied by this Court. *Dargan* v. *New York,* 400 U. S. 920 (1970). An application for rehearing was denied on January 11, 1971 [400 U. S. 1002 (1971)]. See, also, *DeBacker* v. *Brainard,* 396 U. S. 28, 30 (1969).

(2)

It is unnecessary to give a lengthy analysis of the cases in which this Court has decided whether its determinations are to be applied retroactively or prospectively. The bases have been adequately summarized in several recent cases: *Johnson* v. *New Jersey,* 384 U. S. 719, 726-735 (1966); *Stovall* v. *Denno,* 388 U. S. 293, 296-301 (1967); *Desist* v. *United States,* 394 U. S. 244, 247-254 (1969); *Williams* v. *United States,* 400 U. S. ——, 28 L. Ed. 2d 388, 395 (1971).

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), it was decided that the Fourteenth Amendment made the Sixth Amendment applicable to the states, that therefore a state criminal trial must be by jury where requested except in petty cases, and that a crime punishable by two years in prison is a serious, not a petty, crime. *Bloom* v. *Illinois,* 391 U. S. 194 (1968), reached a similar result with respect to criminal contempt proceedings, holding that a request for a jury trial should have been granted since the offense was serious and not petty as shown by the punishment of 24 months' imprisonment.

In *DeStefano* v. *Woods*, 392 U. S. 631 (1968), it was held that neither *Duncan* nor *Bloom* should apply retroactively. The opinion first quoted the governing considerations from *Stovall* v. *Denno*, *supra*, 388 U. S. at p. 297, as follows (p. 633):

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

It then said that all three factors favored prospective application of *Duncan*, giving the following reasons (pp. 633-634):

> "*Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, 'We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' 391 U.S., at 158. The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. *E.g.*, *Maxwell* v. *Dow*, *supra*. Several States denied requests for jury trial in cases

> where jury trial would have been mandatory had they fallen within the Sixth Amendment guarantee as it had been construed by this Court. See *Duncan* v. *Louisiana*, *supra*, at 158, n. 30. Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee."

Even though the Court found that the considerations were more evenly balanced with regard to *Bloom*, it also held that retroactive application was not warranted, stating its reasons as follows (pp. 634-635):

> "One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. However, the tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by *Bloom* v. *Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial."

(3)

It is our contention that an application of the same considerations require that *Baldwin* v. *New York,* 399 U. S. 66 (1970), be given only prospective application from the date of its determination, June 22, 1970.

We can perceive of no valid basis for giving it retroactive application to the time of the *Duncan* decision on the ground stated by the District Court that *Baldwin* "is nothing more than a required reiteration of the Supreme Court's admonition in *Duncan.*"

It is evident from a reading of *Duncan,* which dealt with a possible maximum punishment of two years' imprisonment, that the Court was refusing to pass upon or anticipate whether it would require a jury trial where the maximum punishment was only one year's imprisonment, the issue decided in *Baldwin.** The Court concluded its opinion by saying (391 U.S. at pp. 161-162):

> "We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."

It is true that footnote 33 on page 161 recites that only two states other than Louisiana deny jury trials for crimes punishable by imprisonment for longer than six months. But this footnote no more intimates that the dividing line

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* In *Johnson* v. *New Jersey,* 384 U.S. 719, 734 (1966), the Court said that "if we were persuaded that [the standards] had been *fully anticipated by the holding in Escobedo,* we would measure their prospectivity from the same date." (italics added.)

would be set at six months than does the sentence to which the footnote was dropped intimate that it would be set at one year. That sentence reads (p. 161):

> "In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail."

That the question decided in *Baldwin* was left completely open in *Duncan* is evident from the opinions in other cases. In *Bloom*, decided on the same day as *Duncan*, the Court pointed out that (391 U. S. at p. 211):

> "In *Duncan* we have said that we need not settle 'the exact location of the line between petty offenses and serious crimes' * * *."

In *DeStefano* v. *Woods*, *supra*, the Court said (392 U.S. at p. 633):

> "Both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for a jury trial be honored."

It cannot be denied that *Duncan* indicated a possibility that it would ultimately be held that a crime punishable by a sentence of more than six months was a serious crime, requiring a jury trial. The opinion, however, also indicated the possibility that the dividing line, left open by *Duncan*, would be drawn at one year. The latter result, if it had been reached by this Court, would have been completely consistent with all that was decided by and said in *Duncan*.

Nor do the standards applied in determining whether a Supreme Court ruling adopting new doctrines in criminal law should be applied prospectively or retroactively require a retroactive application of *Baldwin*. The three standards have been quoted herein at page 3.

"(a) the purpose to be served by the new standards"

In *DeStefano* v. *Woods, supra,* 392 U. S. at p. 634, the Court concluded that the values implemented by the right to a jury trial would not be measurably served by requiring a retrial of all persons previously convicted by procedures not consistent with the right to jury trial provided by the Sixth Amendment.

"(b) the extent of the reliance by law enforcement authorities on the old standards"

In *DeStefano, supra,* 392 U. S. at p. 634, the Court found that this factor also favored prospective application because several states had denied jury trials in circumstances in which such a trial would have been mandatory under *Duncan*. It is obvious that the Court was referring to three states: Louisiana, New Jersey and New York. Although only one state, instead of three, would be affected by retroactive application of *Baldwin,* the number of cases affected in that state (those in the New York City Criminal Court) is substantial. Undoubtedly, the number of misdemeanor cases in New York City would equal, if not exceed, the cases in the other two states in which, under *Duncan* and *Baldwin,* jury trials, theretofore denied, would be required.

"(c) the effect on the administration of justice of a retroactive application of the new standards"

The impact of a retroactive application would be substantial. If *Baldwin* had been applied retroactively immediately after it had been decided, it would have required new trials for the several thousands of prisoners then serving sentences after having been convicted of misdemeanors for which the sentence would have been as much as a year. Even today a retroactive application would create collateral problems with respect to all of those convicted for misdemeanors since the *Duncan* decision on May 20, 1968. Increased penalties may be imposed for several New York crimes if the defendant has been previously convicted of any crime. See, e.g., N.Y. Penal Law §§ 265.05(3), 265.05 (5), 265.05(9). In addition, a prior conviction may be considered generally in imposing sentence. At least one Appellate Division in New York has held that, under analogous circumstances, a person who had been found to be a juvenile delinquent could bring a proceeding to set aside that determination many years after the completion of his confinement on the basis of giving a Supreme Court decision retroactive effect. *Matter of Roy M. (Anonymous)* v. *People*, 33 A D 2d 232 (2d Dept., 1970). Cf. *Sibrun* v. *New York*, 392 U.S. 40, 55 (1968).

A retroactive application of *Baldwin* would seriously disrupt the administration of justice. Whether attacks on convictions since *Duncan* were made in independent proceedings or in the course of future criminal proceedings, courts and prosecutors, already having great difficulty in keeping up with current cases, would have to devote substantial time to the reviving of these earlier cases.*

* Some indication of the number of misdemeanor convictions in the New York City Criminal Court during the period involved

In discussing the standards with regard to prospective or retrospective application, we have referred to the *DeStefano* case insofar as it held that *Duncan* should be given a prospective application. In that regard the Court found that (392 U.S. at p. 633): "All three factors favor only prospective application * * *." It should be noted, however, that the Court also held that *Bloom* should be applied prospectively even though it concluded that (392 U.S. at p. 634):

> "The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom* v. *Illinois* [391 U.S. 194]."

CONCLUSION

The petition for a writ of certiorari should be denied.

July 7, 1971.

Respectfully submitted,

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may be gleaned from a statistical table in the Fifteenth Annual Report of the Judicial Conference of the State of New York (1970), p. A179, which shows the convictions for misdemeanors or lesser offenses in that Court for the counties within New York City exceeded 100,000 during the calendar year 1968.